

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Sections of the)
Cable Television Consumer)
Protection and Competition Act of)
1992; Sixth Order on)
Reconsideration)

MM Docket 92-266

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VIACOM INTERNATIONAL INC.
RESPONSE TO PETITIONS FOR RECONSIDERATION

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February 3, 1995

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In the Matter of)
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1992; Sixth Order on)
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Rate Regulation)

MM Docket 92-266

To: The Commission

**VIACOM INTERNATIONAL INC.
RESPONSE TO PETITIONS FOR RECONSIDERATION**

Viacom International Inc. ("Viacom"), by its attorneys, hereby responds to certain petitions for reconsideration of the Commission's Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking ("Order") in the above-referenced proceeding.¹ Viacom replies to the petitions of cable operators (the "Petitioners") that ask the Commission to permit "limited migration" of channels from regulated tiers to unregulated New Product Tiers ("NPTs").²

Viacom believes that the Commission's NPT "no migration" policy carefully balances the interests of operators,

¹ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking) in MM Docket No. 92-266, FCC 94-286 (rel. Nov. 18, 1994).

² Petition for Reconsideration of Cox Communications, Inc. at 19 (see generally id. 4-9, 19-23); Petition for Reconsideration of Continental Cablevision, Inc. at 1-10.

programmers and subscribers. Viacom is therefore concerned that Petitioners' requested revision of this policy would harm consumer and programmer interests. Accordingly, Viacom urges the Commission to retain the ban on NPT migration and also to clarify that a programmer's affirmative consent is required before an operator can migrate a regulated program service to an NPT or a la carte carriage.

I. THE PROHIBITION ON MIGRATION OF REGULATED CHANNELS TO UNREGULATED NPTS PROTECTS CONSUMER AND PROGRAMMER INTERESTS AND SHOULD NOT BE DISTURBED

The Petitions do not justify modification of the ban on migration of regulated program services to unregulated NPTs. The Order established unregulated NPTs to encourage operators to introduce new packages of channels under rate regulation. The FCC expressly premised operators' ability to do so, however, on the requirement that operators not move program services from Basic Service Tiers ("BSTs") or Cable Programming Service Tiers ("CPSTs") to NPTs. After considering policy arguments such as those made in the Petitions, the FCC determined that the migration prohibition was an indispensable safeguard for an NPT scheme. The policy basis for the prohibition is plain: to protect consumers from dilution or weakening of tiers of service currently available to them on a rate-regulated basis.³

³ Order at ¶ 27.

Nonetheless, Petitioners argue that the Commission should revisit this prohibition given the FCC complaint rulings that certain operators who created a la carte packages with a small number of migrated channels prior to September 30, 1994 will be permitted to treat the packages as NPTs.⁴ It is apparent, however, that these limited rulings were made only as a matter of equity -- despite the potential harm to consumer and programmer interests -- "in light of the uncertainty created" by the Commission's a la carte test. The Commission's prohibition on migration to NPTs has now removed any such uncertainty on a prospective basis.⁵ Petitioners' calls for private equity do not justify prospective modification of the Commission's sound public interest determination.

Petitioners further argue that cable operators will not create NPTs if they are not permitted to migrate popular "foundation" channels from regulated channels.⁶ But the Petitions cannot justify the removal of any channels from regulated service given the fact that FCC rules permit "cloning" of popular services onto NPTs.⁷ By adopting this

⁴ Cox at 22; Continental at 3-10.

⁵ Order at ¶ 50.

⁶ Cox at 20; Continental at 6-8.

⁷ As with migration, cloning would require the affirmative consent of the program service at issue.

cloning policy (over programmers' objections), the Commission's rules have already taken substantial steps in support of operator flexibility. Were the Commission to allow migration, however, it would upset the current balance between operator flexibility and subscriber and programmer interests in maintaining the availability of popular services on regulated tiers.

II. THE COMMISSION SHOULD CLARIFY THAT CABLE OPERATORS MUST OBTAIN THE AFFIRMATIVE CONSENT OF PROGRAMMERS IN ORDER TO MIGRATE A REGULATED PROGRAM SERVICE

Should the Commission abandon its ban on NPT migration, Viacom urges the Commission to clarify that operators moving regulated channels to NPTs (or to a la carte carriage) may not abrogate agreements prohibiting such actions. As Viacom previously has commented, no party to this proceeding has advanced a public interest justification to vitiate valid contractual provisions in programming affiliation agreements.⁸ Likewise, in the absence of such contractual provisions, operators should be required to obtain the affirmative consent of the programmer before subjecting its service to any such migration.

Removal of advertiser-supported program services from widely-carried regulated tiers substantially reduces a

⁸ See Reply Comments of Viacom International Inc. in MM Docket No. 92-266 (July 29, 1994) at 5-6.

network's advertising revenue base, thereby undermining a programmer's ability to deliver quality programming to the viewing public at a reasonable price. Hence, operators migrating a program service to an NPT should not be allowed to rely on FCC rules in abrogation of affiliation agreements specifying, for example, that the network is to be carried on the most widely distributed level of service.

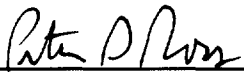
Similarly, if a contract is silent as to the tier location of a program service, the affirmative consent of the programmer should be required before the service can be removed from a regulated tier. Such a policy would preserve the mutually agreed upon business plans of the parties and protect the economic expectations of programmers whose viability depends upon carriage on widely-distributed tiers.

III. CONCLUSION

For the foregoing reasons, Viacom respectfully urges the Commission to reaffirm its prohibition on migration of regulated channels to NPTs and to provide, in any event, that operators may not migrate program services absent the affirmative consent of the programmer.

Respectfully submitted,

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February 3, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 1995,
I caused copies of the foregoing "Response to Petitions for
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